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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-9411

ISRAEL DIAZ-MARTINEZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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ISRAEL DIAZ-MARTINEZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Israel Diaz-Martinez, respectfully requests that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals, for the Second Circuit entered on or about November 5, 1975, affirming a judgment of the United States District Court for the Eastern District of New York, entered on or about February 7, 1975 convicting the petitioner after a jury trial of conspiracy to distribute narcotic drug, to wit: cocaine, in violation of Title 21, United States Code, Section 846. As a consequence of the conviction, the petitioner was sentenced to a term of five (5) years imprisonment and a special parole term of ten (10) years.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction. The opinion and decision of the said Court is reproduced herein and designated Appendix A.

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JURISDICTION

The order of the United States Court of Appeals for the Second Circuit is dated November 5, 1975 and a copy of the said order is reprinted herein as Appendix A also, the same being contained in the opinion of the said Court of Appeals for the Second Circuit.

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A. Was the petitioner's right to a fair trial, the petitioner having testified in his own behalf, and petitioner's right to make a defense prejudiced where the Court allowed the Government to refer to evidence and introduce evidence that the Trial Court had already suppressed as being seized in violation of the 4th Amendment to the Federal Constitution, the said Trial Court not instructing the jury as to the limited effect of such evidence, namely, that such evidence went only to the impeachment of the petitioner's testimony?

B. Did the failure of petitioner's counsel to request such limiting instruction relieve the Trial Court from its obligation to so charge the jury and is the petitioner entitled to a reversal of the judgment of conviction because such omission on the part of the Trial Court was plain error.

THE PRINCIPAL CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES OF CRIMINAL PROCEDURE RELIED UPON

AMENDMENT IV—SEARCHES AND SEIZURES:

"The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

RULES OF CRIMINAL PROCEDURE:

"Rule 30.

"*Instructions:* At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the request. . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. . . . "

"Rule 51.

"*Exceptions are Necessary.*"

"Exceptions to the rulings or orders of the Court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action to which he desires the Court to take or his objection to the action of the Court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

"Rule 52.

"*Harmless Error and Plain Error.*"

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

(b) Plain Error. Plain errors or defects Affecting substantial rights may be noticed although they were not brought to the attention of the Court."

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STATEMENT OF THE CASE

In this case the jury did not have the government's evidence to solely consider but also a factual defense supported by the petitioner's testimony. See *U.S. v. Frank*, 494 F. 2d 145, (Cir. 2d, 1974) at page 153 the Court stating in part that:

> "In passing on the sufficiency of the evidence, the Court had only the prosecution's case, the defense having offered none . . . but the self-incrimination clause does not elevate a defendant's silence much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version . . . "

The indictment in this case joined the petitioner with other defendants in the first count charging conspiracy to violate the narcotics statute. The substantive count that was considered by the jury did not charge the petitioner with a violation of the statute underlying this count, 21 U.S.C. 841(a)(1).

Barry Paul Abbot was a drug enforcement agent (57).* The Court deemed this witness an expert in narcotics (57, 59-65).

In October 1973 he met a co-defendant named Victor Blanco at his apartment at 97 Clinton Avenue in Brooklyn (67). He was introduced to Blanco by an informant (69). Abbot inquired from Blanco about buying an ounce of cocaine. Blanco told him that he had a friend who could supply the agent (70, 71).

On November 5, 1973 Abbot and the informant met Blanco at his apartment (71, 72). After Abbot arrived another co-defendant named Manuel Fiffe arrived. Fiffe spoke to Blanco in Spanish and then handed Abbot a package which contained

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* ( ) This refers to the pagination of the appendix supplied to the Court below.

cocaine of an inferior quality (74, 80).

Fiffe asked for $700.00 as the price but settled for $675.00 which the agent gave to him (81-83). Abbot told Fiffe he was interested in future purchases (83).

On November 8, 1973 the agent received a call from Blanco who told him of a "new shipment of uniforms" which of course meant narcotics (90-92). Abbot, accompanied by another agent, met Blanco, Abbot introducing the other agent as "Biff" (92, 93). All drove to a clothing store located at 293 Grant Street, Brooklyn. Abbot and Blanco went inside and Fiffe displayed a sample (94, 95). Abbot approved the sample and agreed to buy an eighth of a kilo indicating he was in the market for a quarter of a kilo also (96, 97). The price for the quarter of a kilo was fixed at $2900.00 and Abbot protested that it was too high. Blanco told Abbot that because of the quality of the cocaine it could be well diluted (97-99). Abbot told Blanco he would return the following Monday to complete the purchase; Blanco and Fiffe then went to a closet where the agent heard "snorting" (98, 99). Fiffe shortly reappeared and gave Abbot a sample of the cocaine (101). While at the store Abbot saw the appellant (103).

On November 12, 1973 Abbot and "Biff" again met Blanco and the agent told him that he wanted the eighth of the kilo he previously saw. Blanco made a telephone call and told Abbot that they had to go to the clothing store (107, 108). They drove to the store at 293 Grand Street (108, 109). At the store Fiffe told Abbot that "it" would shortly be there (109-111). Abbot saw Fiffe dial telephone number 387-7180 and converse. Completing the call Fiffe told Abbot that the package would shortly arrive (112, 113). Abbot left the store and met with a third agent named Chellino (114, 115). Thereafter Abbot returned to the store and again saw the petitioner there (115). Abbot asked Blanco who Diaz was and Blanco told him that the petitioner was the "boss of the store" (116). Again Abbot left the store, spoke to Chellino and returned to the store (117). There Fiffe showed Abbot a small box and asked him to follow to a

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basement through a trap door (118, 119). In the basement Fiffe displayed the cocaine which was of a better quality than the previous purchase (120, 121). Abbot agreed to buy it, bargained, and then paid $2900.00 (122, 123). Blanco said that Fiffe was a messenger and could not reduce the price (122, 123, 125). At this phase, Abbot saw the petitioner and Miranda at the store (127). On November 20, 1973 Blanco asked the witness to see him about "new uniforms" (131). Accordingly he went to Blanco's apartment and met Fiffe (133). Now Fiffe said he wanted to deal in larger quantities such as a quarter or half a kilo (135). Abbot explained that he was discouraged because of the low quality of the previous purchases (136). When Fiffe indicated the source of a higher quality the witness asked to meet the source (136, 137). Fiffe then made a call and Abbot by looking at a card displayed by Fiffe ascertained the telephone number to be 657-1358 (137, 138). Fiffe made an appointment for the witness to meet the source (138). Ultimately all went to the Estrella Record Shop at 1428 Gates Avenue, Brooklyn (140, 141). There the witness met the two co-defendants Vivas and Bermudez (142). A third unidentified person was also present. Blanco said that Bermudez was the "boss" (143). Abbot waited for the shipment which did not yet arrive (149, 150). Ultimately a package was shown to him by Vivas (152). Abbot said the contents were of a good quality but that he did not have enough money to buy all the contents (152, 153, 155). Vivas told him that he would not break up the quantity but that Abbot would have to buy it in its entirety (155-157).

Abbot later told Blanco that he wanted to buy a quarter of a kilo but Blanco told him that only the larger portion would be sold (163).

On November 23, 1973 Abbot met Blanco at his apartment. Blanco told him he could not contact Fiffe because the store was closed (165, 167, 168).

On November 26th Abbot with "Biff" again went to the clothing store with Blanco to see Fiffe (169). He saw the

petitioner there and also one Ralph Diamond (169, 170). This witness spoke to Fiffe about a larger purchase from Bermudez (171).

On November 29, 1973 Abbot met Juanita Guzman a/k/a Juanita Diaz at Blanco's apartment (172). He saw this woman previously at the clothing store. Abbot discussed larger purchases with Blanco; Guzman told him that her "husband" was "boss" of the clothing store (175). She said she would try to arrange for Abbot to deal directly with Bermudez (176, 177). She added that if Abbot wanted smaller quantities he should go to the store saying "if you want quarters, come to the store. We can take care of you." (177).

On April 3, 1974 Abbot returned to Estrella's Record Shop and spoke to Vivas (178). Vivas told Abbot that he had nothing when Abbot asked him for a half a kilo (179, 180). On a later visit to that store on April 5, 1974 Vivas again indicated that he had "nothing" (181).

Alexander Dovedko, another agent, testified (192). He related that he had Abbot and other agents under surveillance and saw them visit 97 Clinton Street, Blanco's apartment, the clothing store, the record shop, at the times related by Abbot in his previous testimony (193, 195, 197, 199, 200, 201, 203, 204, 206, 208, 210, 213, 215).

On November 12, 1973 during the surveillance he saw Miranda enter and leave the clothing store with the petitioner (204). Miranda and the petitioner were followed to an auto body shop where they spoke to persons inside (205).

Nicholas Alleva, another federal agent, testified that he observed Abbot and others on November 5, 1973 (216, 217). He followed Abbot and Fiffe to 293 Grant Street (218). He observed Fiffe approach the petitioner in the store and the two went into a back room and shortly thereafter emerged and then went to Miranda who was in the store. Fiffe was further observed to have given a package to Miranda (220, 221). On November 20, 1973 this agent saw Abbot enter and leave 97 Clinton Avenue. He also

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saw Fiffe enter those premises. Ultimately he followed them to the record shop (221-223).

Next, the government called Fiffe as a witness (280). His testimony had to be translated by a Court interpreter (280, 281). He related that he was convicted under the indictment in this case (283). He worked for the petitioner at the clothing store (287, 288). On November 5, 1973 he began trafficking in cocaine for the petitioner (291, 292). The petitioner was his source of supply (293). He received no profits from sales (295). He also used cocaine (296, 297).

Fiffe knew Blanco (298).

Diaz rented an apartment for Juanita Guzman (299). The petitioner allegedly prepared cocaine at that apartment (300).

Fiffe related that he met Abbot, the agent, and made sales to him (303). Thus as to the sale of November 5, 1973 the petitioner gave Fiffe the narcotics which he delivered to Blanco who made the sale to Abbot (303, 304). Petitioner set the price of that transaction at $500.00 (304, 305).

On November 8, 1973 Fiffe spoke to Barry about a sale of a quarter of a kilo of cocaine. The petitioner allegedly gave Fiffe a sample to give to Blanco and the agent and ultimately he gave it to the agent, Barry, on November 8, 1973. This was the day he also "sniffed" the cocaine (309-311).

On November 12, 1973 he again met Barry and this meeting was previously arranged for the day before by Blanco. He informed the petitioner that on November 12, 1973 Barry and Blanco were expected at the store to purchase an eighth of a kilo. The petitioner told him that the narcotics would be at the store at about 4:00 P.M. that day (309-312). On that date the petitioner and Miranda left the store before Barry arrived. The petitioner told Fiffe to wait at the store for his telephone call. The petitioner did call him and told him to tell Miranda to go to Guzman's apartment (312, 313). That day Miranda did deliver an eighth of a kilo of cocaine to the store and this was after Fiffe called Guzman's apartment. The petitioner told Fiffe to keep the

package in the basement of the store until Barry and Guzman arrived (315).

When Barry and Blanco arrived Fiffe took them down to the basement. After Barry approved the quality Fiffe told him the price was $2900.00 (315). Barry ultimately paid (316).

On November 19, 1973 Blanco asked Fiffe whether he could arrange for a sale to Barry in a larger quantity, namely half a kilo (317). However, Fiffe admitted that he never saw the petitioner sell a half a kilo of cocaine. At the most he ever sold with the petitioner being his source was one eighth of a kilo (318, 319). However he did ask the petitioner whether he could produce half a kilo of cocaine. The petitioner replied that he was waiting for the arrival of some cocaine but he didn't know when it was going to arrive and that he had no more cocaine to sell at that time (319-321).

It may be recalled that there was testimony that Fiffe drove a Mercury 1967 car. That car was given to him by the petitioner and he drove it to the meetings that were testified to by the previous government witnesses. These meetings were those of November 5th, 12th and 20th (343).

Next, the government called Luis Felipe Miranda. As can be expected, he was a narcotics offender both in the past and under the indictment in this case (352, 353). Prior to his arrest in this case he was employed by the petitioner at his clothing store, previously described (355). In October 1972 he spoke to the petitioner and Fiffe about the clothing business being poor (357, 358). According to the witness the petitioner then began dealing in cocaine so that Miranda and Fiffe could earn some money (357, 358). On October 3, 1973 he, the petitioner and Fiffe began selling cocaine (358). The witness related that the petitioner lived with Guzman (358, 359).

He also related that the petitioner received calls at the store about cocaine (359). Fiffe told him that on one occasion he didn't get paid for his narcotics activity (359, 360). However, he also related that Fiffe did receive tips from the narcotics

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customers (360). Guzman's apartment, according to this witness, was the storage place for the cocaine (360, 361). He also picked up a package of narcotics from her apartment at the petitioner's direction (361).

According to Miranda, narcotics were kept in the basement of the store as well as in old clothes (362). He saw the petitioner bring narcotics into the store on two occasions (362). He also delivered narcotics supplied to him by the petitioner (363, 364). He received $600 to $1000 weekly for such deliveries and gave the proceeds to the petitioner (364).

The petitioner, according to this witness, also "cut" the narcotics and the usual amount was one eighth of a kilo (364, 365). On or about October 30th or 31st, 1973, Miranda spoke to the petitioner about quitting but the petitioner threatened to tell his parole officer and thus jeopardize his conditional liberty (368, 369). On November 5, 1973 he received a phone call from the petitioner who told him to go to the apartment at 239 South 4th Street in Brooklyn. There he saw the petitioner and Guzman. The petitioner had him taste the narcotics for quality (369, 370). The petitioner and Guzman then mixed the narcotics and tested its quality in the mixed state (370). On November 12, 1973 he went to the clothing store with the petitioner. There Fiffe told him of a proposed purchase. The petitioner left the store with Fiffe telling Miranda he would call him back (371). The petitioner called him and he went to Guzman's house to get a package which she gave him (372-374). In turn he gave this package to Fiffe who told him that Blanco and the agent (Barry) were expected to make a purchase (374).

THE DEFENSE

As part of the opposition to the government's case, the petitioner successfully moved in timely fashion to have the evidence suppressed under a search warrant that was executed March 26, 1974 (7-12). The evidence seized under that warrant was seized in the basement of the clothing store (13).

The Court narrowed the issue underlying the search and seizure as to whether the search warrant was specific or too broad (14, 17, 27-29). To determine the issues, as to how the warrant was executed, the Court conducted an evidentiary hearing (227, 236, 241, 246, 247, 249, 256, 259, 269). The seizures in this case (which did not consist of narcotics, but implements used in connection with narcotics trafficking) were seized in the basement of the store (269). The Court granted the motion holding that the warrant was a general warrant and did not specifically describe the exact area to be searched under the warrant (273-275). The Court therefore suppressed the evidence that was retrieved in the basement of the store (276-279).

The Court ruled that the suppressed evidence could be used as a basis for the cross examination of petitioner by the government if petitioner testified (see Appendix B).

Thereafter, when the petitioner was cross examined, the Court allowed the product of the search and seizure to be used by the prosecutor.

The petitioner called a witness named Rivera who testified that in September 1973 he was a part-time worker for the petitioner. His employment continued to October 1973 and he worked at the store at 239 Grant Street. His job was to deliver clothes to customers (453).

He knew Miranda, the government's witness (454). In September 1973 Miranda spoke to him about cocaine and this witness told him that he didn't use it (456). Miranda cautioned him not to tell the petitioner because if the petitioner learned of this he would fire him (456). However Miranda did give him a card and told him that if he had a buyer for cocaine to call him, namely Miranda (458). This card was admitted into evidence as to its face and not its rear as Defendant's Exhibit "E" (459). The witness explained he never saw cocaine before that day (460). He never saw the petitioner in possession of cocaine. Further, the petitioner was usually in and out of the store during the day (461). This witness also knew Fiffe who stayed in the store during the day (461).

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Helen Berrios testified that she was a barmaid (463). She knew Fiffe and spoke to him prior to July 1974 (464). During the summer of 1974 she received several telephone calls from Fiffe (465). Fiffe, over the telephone, told her to tell the petitioner to retain an attorney for him and to supply his wants as he was in jail (466).

In August 1974 Fiffe told her that if the petitioner didn't help him out Fiffe would implicate him in Court by perjuring himself and further that he would kill the petitioner (466, 467).

Berrios also knew Miranda for about three or four years previously. Miranda called her in the summer of 1974 and asked her to tell the petitioner to help him pay for an attorney and that if he didn't he would implicate him falsely (467, 469).

Next, the petitioner testified that in 1972 he went into the clothing business under the corporate name of Boro Wide Clothes Corp. (471, 472). He then moved his business to 293 Grant Street, Brooklyn (472). He described the distribution of clothes (473).

The petitioner explained that he stayed in the store for about two to four hours and then conducted his business (clothing) outside of the store (474). He employed Fiffe whose duties required him to stay in the store during business hours (476). The petitioner described the neighborhood or area as one that was frequented by drug users (477). He knew that Fiffe used narcotics (477, 478).

The petitioner met Guzman through Miranda (478). He utilized her as a cashier in the store. He also gave her money (479).

The petitioner testified he never saw narcotics at the store (480, 481).

The petitioner denied handling or trafficking cocaine in Guzman's apartment (480).

Continuing his testimony, the petitioner explained that he met Miranda in 1972 and gave him a job when Miranda told him that

he was under indictment for a narcotic violation and needed a job (481). Miranda apparently went to jail thereafter and when he was released was re-employed by the petitioner in 1972 (481, 482).

The petitioner stated that he told Miranda that business was bad and that he couldn't continue to employ him (483). Consequently he bought Miranda a stand at a public market at 110 Moore Street to sell clothing (483, 484). The petitioner then described the physical layout of the building at 293 Grand Street, Brooklyn (484-486). The building was characterized as being tenanted by other people (486). There was a trap door to the basement in the store (485). The tenants of the building had access to the basement from the street level entrance to the basement (486). The petitioner testified he did not know Vivas and Bermudez, the co-defendants in this case (487, 488). Nor did he ever see Abbot or the other special agents before the case (468).

After the petitioner's arrest, Fiffe and Miranda called him (489). As a result of the calls he sent them each $50.00 (490). The nature of the calls from Miranda and Fiffe were threats to coerce the petitioner to help them, the government witnesses telling him they would implicate him if he didn't (490-492).

During the cross examination of the petitioner he was questioned extensively about the product of the search and seizure under the void warrant. Thus the prosecutor pressed the petitioner as to the search of the store on March 26, 1974 (537). The petitioner was questioned about narcotics being in the store and implements used to prepare the narcotics for trafficking (539). The prosecutor questioned him about lactose being found in the basement of the store as well as plastic bags (539, 540). Not only did the petitioner deny that he knew about these articles, but he stated that he used plastic bags to wrap shirts and pants (540). The petitioner was further questioned about a strainer being found in the store (540).

Continuing the cross examination in this area, the petitioner

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was questioned about the search warrant which was declared void and the search under the warrant (541, 542). He was further questioned about a statement he gave to Fiffe to the effect that it was to his benefit that he moved marijuana out of the basement prior to the execution of the search warrant (542).

Then the void warrant was received in evidence as part of the government's case (Government's Exhibit A, 544). The statement on the warrant was used in an effort to impeach the petitioner's credibility (545). It thus appeared that the petitioner wrote on the warrant words to the effect that he pushed an agent out of the basement when the warrant was being executed (546, 548).

Again the petitioner was questioned about the lactose found in the basement (549). The Court further allowed the prosecutor to read the return which resulted from the execution of the search warrant and contained an inventory of the products of the void search and seizure (549, 557, 558).

Lastly, a stipulation was entered into by petitioner's counsel and the prosecutor as to what was found in the basement in order to spare the time of the Court by the calling of additional witnesses (565, 566, 567, 568, 590, 591).

REBUTTAL

At this phase of the case the government called a witness named Rodriguez who testified that he was a New York City policeman (577). He related that on January 17, 1975 he was at a bar known as Jose's Bar (578). He spoke to the petitioner at the bar (578, 579). He told the petitioner that he wanted to buy a half a kilo of cocaine and the petitioner allegedly told him that he didn't have any but he expected a shipment within a couple of days (581, 582). In that conversation the petitioner told him that the witness should call the clothing store and that if he weren't there he should call for Fiffe (581).

For counter rebuttal, the petitioner testified he was not at the

bar when the previous witness testified he was because that particular day was a Thursday and that the stores were open late. Therefore, to carry on the clothing business he had to supply the stores and to get the salesmen ready for Friday which would be pay day so that the customers would be able to purchase clothing (586, 587). The petitioner denied ever seeing the previous witness, Rodriguez (599).

REASONS FOR GRANTING THE WRIT

POINT I

THE COURT DID NOT INSTRUCT THE JURY AS TO THE LIMITED PURPOSE FOR ADMITTING INTO EVIDENCE THE MATERIALS SEIZED IN THE PREMISES UNDER THE VOID SEARCH WARRANT AND FURTHER PREJUDICED THE PETITIONER'S RIGHT TO A FAIR TRIAL BY ALLOWING THE GOVERNMENT PROSECUTOR TO EXCESSIVELY CROSS EXAMINE THE PETITIONER AS TO HIS POSSESSION AND KNOWLEDGE OF THE MATERIAL SEIZED UNDER THE VOID SEARCH WARRANT AND FURTHER PREJUDICED PETITIONER'S RIGHT TO A FAIR TRIAL BY ALLOWING THE VOID SEARCH WARRANT INTO EVIDENCE

As the facts indicate, no narcotics were found in the basement of the clothing store. Instead, the suppressed materials that were retrieved under the void search warrant consisted of lactose and other materials that could be used in preparing the narcotics for sale. These were allowed in evidence. As the Court held however in suppressing the evidence and allowance of the aforesaid would be for the limited purposes of impeaching the petitioner's credibility if he chose to testify.

Therefore, the issue in this case relates to the case made rule

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of excluding illegally seized evidence.

It seems that despite the controversy as to the exclusionary rule that was judicially shaped to effectuate the values of the 4th Amendment, this rule has recently been reaffirmed. For in *Brown v. Illinois*, —U.S.—, 45 L. Ed. 2d 416, at 426 it was stated that:

> ". . . The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interest in policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits . . . "

Decided simultaneously with that case was this Court's recent ruling in *U.S. v. Peltier*, —U.S.—, 45 L. Ed. 2d 374, (1975) at page 380 where this Court referred to the two elements of the exclusionary rule. These elements were deterrents and preservation of "judicial integrity". In other words, there is an element in the rule as to insulating the Court's from the illegal conduct of the authorities to procure evidence.

In this case, there was no question but that the Court recognized the limited role of using suppressed evidence to impeach the credibility of a defendant who chose to testify.

See *Walder v. U.S.*, 347 U.S. 62, 1954; *Harris v. New York*, 401 U.S. 222 (1971) and *Oregon v. Haas*, —U.S.—, 43 L. Ed. 2d 570 (1975). Preceeding those cases a similar issue was considered in *Agnello v. U.S.*, 269 U.S. 20 (1925). These cases considered what, if any use, the prosecution could make of evidence suppressed under the rules enforcing the values of the 4th Amendment (*Walder* and *Agnello*) or the 5th Amendment guarantee against self-incrimination (*Harris* and *Haas*).

Walder dealt with two conflicting rights. One was the right of a defendant to testify truthfully in his own defense and the other the right to be free of an illegal search and seizure. *Walder* held that where an accused testified and denied ever dealing in

narcotics, the prosecution could cross examine the accused as to an earlier dismissed case based on a narcotics violation where the dismissal was based on an illegal search and seizure. However, the cross examination in *Walder* in distinction to the cross examination in this case, was limited and related to collateral material. On page 64 it was recognized that:

> ". . . The trial judge admitted this evidence but carefully charged the jury that it was not to be used to determine whether the defendant had committed the crimes he had charged, but solely for the purpose of impeaching the defendant's credibility . . . "

There was no such limited instruction to the jury in this case.

The problem again arose in *Harris v. New York,* 401 U.S. 222, *supra. Harris* involved an involuntary confession. The confession was utilized to impeach the testimony of the defendant who chose to testify in his own behalf at a state trial. The finding that the ruling in *Walder* was related to collateral matters, it was nevertheless applicable to directly impeaching evidence by way of a confession this Court did state on page 224 in part that:

> ". . . It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards."

The evidence in this case while suppressed, was consistent with innocent use because such suppressed evidence were ordinary materials that could be used for innocent purposes.

However in *Oregon v. Haas, supra,* 41 L. Ed. 2d 570 the *Harris* ruling was applied to a state of facts where the police did give full Miranda warnings but the accused could not get a lawyer immediately after requesting one. During this hiatus he of course incriminated himself. The opinion in *Haas* recognized the limitation in *Harris,* namely that the evidence be trustworthy, at page 577.

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However *Haas* recognized at page 578 that:

> ". . . If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."

It is respectfully suggested that in the facts attendant to this case, the execution of the void search warrant was more penetrating and was a grosser violation of the applicable constitutional right that the circumstances in *Harris* and *Haas* suggests. For in *Harris* and *Haas* the involuntariness of the confessions was not the product of an intensive coercion used to get confessions but the failure to conform to the required formalism mandated by *Miranda.* In this case the petitioner's store was broken into and searched and the seizures were made under a void search warrant. This it is suggested further was a gross violation of the 4th Amendment. It was also a violation of the privilege against self-incrimination, because subjecting a person or his property to a search and seizure is also causing a person to incriminate himself. See also *Boyd v. U.S.*, 116 U.S. 616 and *Mapp v. Ohio*, 367 U.S. 643 (1961), concurring opinion of Mr. Justice Hugo Black, footnote 4 at page 662.

Further despite the uncontested fact that the Court in its initial ruling suppressing the evidence recognized the limited nature of the exclusionary rule, nevertheless did not bring home to the jury that the suppressed evidence had a limited evidentiary value and to aggravate the situation the Court admitted into evidence the void search warrant itself. Just of what evidentiary value the void search warrant was is puzzling. Furthermore the inventory, the catalog of the products of the illegal search and seizure was orally described before the jury and additionally the jury had before it the voided search warrant and the written inventory or a stipulation as to what was seized. It is suggested that the search warrant to a lay jury had the appearance of legality and could be recognized by laymen as putting an official

stamp of approval on the government's contentions as to petitioner's guilt. Moreover, the cross examination of the petitioner by the prosecutor as to the fruits of the search was not limited and brief, but an extensive cross examination hereinabove set forth in petitioner's description of the facts adduced at trial. The ruling of *Walder, Harris* and *Haas* emphasize the limited use of suppressed evidence.

Furthermore, the petitioner's testimony amounted to no more than just a general denial. The author of the majority opinion in *Harris v. New York*, the Chief Justice of the United States, also was the author of a dissenting opinion found in *Lockley v. U.S.*, 270 F. 2d 915, (C.A.D.C. 1959) where on page 918 it was stated:

> ". . . From the Walder case I would conclude that before admissible evidence can be used for impeachment three factors must be present: (1) the defendant must elect to take the stand, (2) his testimony which conflicts with the inadmissible statements must do more than merely deny the elements of the crime for which he is being tried, and (3) the inadmissible statements should be received only to the extent that they do not admit the very acts which are essential elements to the crime charged . . . "

It was further stated in the dissent that where the impeaching material is to be offered the Court should compare the defendant's testimony with the inconsistent illegal evidence and only receive in evidence that part of the inconsistent evidence which does not reach a confession of guilt by the defendant. In distinction, in this case, the suppressed evidence when admitted related to proof of the government's case in chief. For the conspiracy count alleged that there was an agreement to distribute and possess with intent to distribute the cocaine. The material found in the basement was not narcotics. The material could have been used for the distribution in that such material was used in packaging and mixing narcotics. However, this evidence could also have been used for innocent purposes. It is

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submitted it was not so vital to the prosecution's case because it was consistent with innocent use. As to the jury, the products of the illegal seizure could have been considered by the jury as collaboration of the testimony of the self-confessed narcotic offenders who testified for the prosecution.

It is uncontested that nowhere in the charge or even the later supplemental charge to the jury was there a cautionary instruction by the court to the jury about the limited nature of the introduction of the articles constituting the suppressed evidence. Yet the Court who earlier and during the trial announced that the suppressed evidence could be used solely for impeachment stated on pages 608-609 of the charge found in the Appendix supplied to the Court below that:

> "I cannot recall whether a witness was faced with a prior inconsistent statement during this trial, and that is what we call impeaching a witness, which means that a lawyer may ask the witness whether at a previous time he made a statement that is different than the testimony he gave before you . . . , then you determine the effect a prior inconsistent statement has on the credibility of that witness."

It is submitted the Court was well aware of the limited use of suppressed evidence being confined solely for impeachment.

What was introduced by the prosecution in this case were not oral inconsistencies but real evidence. Consequently the jury even if it could understand the limitation of inconsistencies as being relevant solely to the credibility of a witness, had before it evidence which it could consider as evidence in chief and in full support of the prosecution's case. There was nothing limited about the introduction of the suppressed evidence.

At any rate, this Court is also asked to consider whether a lay jury could make the distinction between evidence used solely to impeach the credibility of a defendant who testified in his own behalf and the use of evidence to prove the government's case.

As was stated in Note 42 Geo. L. J. 563, 565 (1954):

> "It is easy enough to instruct the jury that the facts are to be weighed only when determining the defendant's character for truth and veracity. Whether a jury would stay within these prescribed limits is questionable. The danger of using impeaching evidence substantively is probably increased where the impeaching evidence is closely related to the material issue of the case."

See also *Jackson v. Denno*, 370 U.S. 368 (1964); *Bruton v. U.S.* 391 U.S. 123 (1968).

POINT II

THE COURT BELOW SHOULD HAVE RECOGNIZED THAT THE TRIAL COURT'S FAILURE TO CHARGE THE JURY AS TO THE LIMITED USE OF THE SUPPRESSED EVIDENCE CONSTITUTED PLAIN ERROR.

The trial court and the government prosecutor knew of the issue. Yet because of the defense counsel's failure to make the appropriate request, or take exception to the Court's charge, the petitioner received an unfair trial. In other words, the Court below attributed all fault to the defense counsel. The issue involved was not a mere technicality which counsel should have noticed. The question was one of constitutional magnitude recognized by the trial court who recognized the limitation of the exclusionary rule. The prosecutor was present. The prosecutor at no time ever made known to the Court that the charge to the jury was deficient. Of course the prosecutor is not faulted for this. It is suggested however that the prosecutor acting in interest of the government, should have made this known to the Court, so as to preserve a verdict favorable to the government and avoid an issue on appeal.

The Court below in its opinion, held that the problem was not of sufficient gravity to envoke the plain error rule. See Rule 52,

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Rules of Criminal Procedure, subdivision (b) supra. It is put that the omission in the Court's charge affected the petitioner's right to a fair trial. The omission compounded the first Constitutional violation, namely, the illegal execution of the search warrant. Errors affecting substantial rights will be recognized as amounting to plain error even if the defense counsel does not object or take exception. See *U.S. v. Davis*, 493 F. 2d 502, 503, 505 (Cir. 5th, 1974).

Rule 51, supra, provides for flexibility in regard to making exceptions at trial. That Rule further provides that it is sufficient once an exception or objection is made known to the Court. Here there was no necessity to make any objection or exception to the jury's instruction. The Court spontaneously ruled that the suppressed evidence would be available for the impeachment of petitioner's testimony.

Furthermore Rules 52 (b) and 30 should be read together. See Moore's Federal Practice, Section 30.04, at pages 30-9, 30-10. It would seem that errors affecting Constitutional rights of an accused must be harmless beyond a reasonable doubt; see *Chapman v. California*, 386 U.S. 18, 24 (1967). It would seem that the error complained of here affected the petitioner's Constitutional rights under the 4th Amendment to the Federal Constitution. Nor can it be said that subtracting the error complained of, the result still preponderated in the prosecution's favor. As noted above, this was not a case where the jury had only the government's evidence. The petitioner put in a defense and produced witnesses. The petitioner does not seek to utilize the exclusionary rule as a license to commit perjury.

As this Court itself recognized in *U.S. v. Atkinson*, 297 U.S. 157 (1936) in criminal cases, appellate courts to vindicate public interest can take notice of errors to which no objection or exception was taken if such errors are obvious or affect the fairness of the trial itself.

At stake in a criminal case is liberty or jail. Where a government prosecutor is negligent in fulfilling a function of disclosure

to the defense, the omission can be overlooked where an appellate court decides whether the defense was "greatly prejudiced"; see *U.S. v. Miranda*, U.S. Court of Appeals, 2nd Circuit, September 1974 Term, decided December 3, 1975, slip opinion 6545, 6561. The error therefore on the part of the prosecution is overlooked and the defendant goes to jail because the appellate court assesses the jury's verdict and the amount of evidence adduced. Yet in a case such as this, the accused goes to jail because counsel did not bring to the attention of the trial court a substantial issue which the trial court recognized at the inception of the trial. It is suggested that the omission of trial counsel was not a waiver of the petitioner's right to a fair trial especially in regard to this Constitutional issue. There was no showing or claim that the omission was trial strategy; see *Henry v. Mississippi*, 379 U.S. 443, 447, 449 (1965).

It can also be recognized that the mistake attributed to the petitioner's counsel could have been the product of the "heat" of trial and the pressing circumstances attendant to a criminal action. In *Kaufman v. U.S.*, 394 U.S. 217, (1969) a federal prisoner instituted a post-conviction application and sought relief from his conviction in a federal court. The issue was an illegal search and seizure. Trial counsel did raise the issue. Appellate counsel did not raise the issue of search and seizure. The government argued that the interests of finality justified denial of the application for post-conviction relief. Yet this Court held to the contrary. This Court further held in Kaufman there was no "deliberate by-pass" of procedural requirements. See *Kaufman v. U.S.* 394 U.S. 217, at page 220. It would seem therefore, where appellate counsel who has to operate in the calm atmosphere omits an issue, the prisoner is not thwarted from pressing his Constitutional claim collaterally. The denial therefore of any relief to the petitioner in this case can be the basis for post-conviction relief provided for in 28 U.S.C. 2255. This would appear as a good reason for applying the plain error rule to direct appeal. In this way, post-conviction applications which are flooding the courts, could perhaps be diminished.

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Furthermore, since the record is silent as to petitioner's trial counsel's omission, one cannot presume the waiver of a fundamental right as was held in *Barker v. Wingo*, 407 U.S. 514, (1972).

It also seems that in *U.S. v. Rose*, 500 F. 2d 12 (Cir. 2d, 1974) the defendant applied for certiorari to this Court. This Court in the light of its recent ruling in *U.S. v. Hale*, 43 U.S. L.W. 4806, June 23, 1975 remanded the matter to the Court of Appeals for the Second Circuit for reconsideration. The Second Circuit in a slip opinion for the September 1975 Term, and dated November 19, 1975, at page 591 nevertheless affirmed because the defendant failed to object to the evidence. The Court followed its ruling in *U.S. v. Indiviglio*, 352 F. 2d, 276 (Cir. 2d, 1965). The reason that petitioner cites this case is because this Court did allow favorable consideration of the issue notwithstanding the defendant's failure to object.

In *U.S. v. Stewart*, the Court of Appeals for the Second Circuit in its slip opinion for the September 1975 Term at page 101 remanded the case to the trial court for resentencing where the appellant in that case never raised the issue of the illegal sentence.

Counsel also cites *U.S. v. Alsondo*, 486 F. 2d 1339, (Cir. 2d, 1973) at page 1344; (see also *U.S. v. Feola*, —U.S.—43 L. Ed. 2d 541, reversing on the main issue but not deciding on the relevant issue enunciated hereinafter. In *Alsondo*, it was stated at page 1344 that:

> "Accepting the controlling precedents somewhat reluctantly, we must conclude that the instruction to the jury on the conspiracy count was erroneous. Although no exception was taken to the charge—indeed, no mention of the issue was made in the briefs submitted to us, not was the question pursued in oral argument until we raised it . . . we nonetheless believe that the charge constituted 'plain error' . . . , which we should notice sun stonde . . . "

In other words, failure to object or except to a charge, is not a fatal jurisdictional defect. It is put, therefore, that in this case, the issue was a very substantial issue, and involved the petitioner's right to testify truthfully and not to have a jury of laypeople, given evidence, the source of which was derived from a violation of a fundamental right.

> "The Federal Rules of Criminal Procedure cast no light on the matter. Rule 29(a) simply provides for a motion for judgment of acquittal "of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." No provision is made for a motion to withdraw one of two specifications in a single count on the ground of insufficiency. There may be an implication in Rule 30 that the failure to object to a particular specification is fatal because it amounts to a failure to object to an "omission" from the charge, but that is not clear. Finally, there is nothing in Rule 52(b) that tells us that the failure of the trial court to withdraw the particular specification *without request* is "plain error." "
>
> * * *
>
> "What prompts our present consideration of Scansaroli's petition for rehearing is his argument that he did make it sufficiently clear to the trial judge that he wanted a judgment of acquittal or some equivalent on the 'nine-months earnings statement' specification."

Since the Trial Judge recognized the issue, there was no necessity for counsel to make the request.

Whatever role the balancing process has in criminal law, petitioner was constrained to refer to the holding of Mr. Justice Douglas in *Downum v. U.S.*, 372 U.S. 734, (1963) where it was stated in part:

> ". . . We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an

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unlimited, uncertain and arbitrary judicial discretion'. This means that the judgment below must be and is reversed." (Internal citations omitted).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

ARNOLD E. WALLACH
A Member of the Bar
of the United States
Supreme Court

STEPHEN R. MAHLER
Attorney for Petitioner

Appendix

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 43, 44, 542—September Term, 1975.

(Argued October 2, 1975 Decided November 6, 1975.)

Docket Nos. 75-1073, 75-1122, 75-1379

UNITED STATES OF AMERICA,

Appellee,

v.

EDUARDO BERMUDEZ, JORGE VIVAS,
and ISRAEL DIAZ-MARTINEZ,

Appellants.

Before:

WATERMAN, OAKES and MESKILL,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge,* of convictions after a jury trial for conspiracy to distribute cocaine hydrochloride in violation of 21 U.S.C. § 846. Held (1) indictment under 21 U.S.C. § 846 need not allege overt act; (2) cross-examination of character witness as to prior offenses of defendant permissible; (3) cross-examination of defendant on basis of illegally seized evidence proper; (4) introduction of real evidence found after conspiracy ended proper; (5) DEA agent qualified to testify white powdery substance was cocaine; (6) instructions on conspiracy and accomplice

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testimony not erroneous; (7) verdict not coerced by Allen-type charge; (8) denial of motion for new trial correct.

Judgments affirmed.

CHARLES SUTTON, New York, N.Y., *for Appellant Bermudez.*

ARNOLD E. WALLACH, Forest Hills, N.Y., *for Appellant Diaz-Martinez.*

THOMAS R. MATARAZZO, Brooklyn, N.Y., *for Appellant Vivas.*

STEVEN KIMELMAN, Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York, on the brief), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal in a rather commonplace drug case raises several questions worthy of consideration.

Appellants Eduardo Bermudez, Jorge Vivas and Israel Diaz-Martinez were convicted by a jury on February 7, 1975, of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. They were each sentenced by Chief Judge Mishler of the Eastern District of New York to a five-year term of imprisonment and to special parole for ten years.

The Government evidence was that in October, 1973, Diaz-Martinez, owner of a clothing store at 293 Grand Street in Brooklyn, New York, had informed his employees, codefendants Manuel Fiffe and Luis Miranda, that they were going to sell cocaine at the clothing store. The cocaine was prepared and stored at the home of a third employee, Juanita Guzman.

On November 5, 1973, Fiffe obtained one ounce of cocaine from Diaz-Martinez and took it to the apartment of another codefendant, Victor Blanco. At Blanco's apartment, Fiffe sold the cocaine for $675 to an undercover special agent of the Drug Enforcement Administration (DEA). Fiffe then returned to the Grand Street clothing store and gave this money to Diaz-Martinez. Three days later, pursuant to a telephone call from Blanco that "the people at the factory had a new shipment of uniforms," the same DEA agent went to the clothing store where Fiffe and Blanco gave him a sample of cocaine they had obtained from Diaz-Martinez. The agent agreed at that time to purchase a one-eighth kilo of this cocaine for $2,900. This sale was consummated on November 12, 1973, in the basement at 293 Grand Street, and the proceeds were again delivered to Diaz-Martinez.

On November 20, 1973, after being told that "the people in the factory had new uniforms" the DEA agent met with Blanco and informed him that he was interested in purchasing a half kilo of cocaine if the quality was right. Blanco relayed this message to Fiffe who informed Diaz-Martinez, but the proposed order was too large for Diaz-Martinez to fill at that time, and he referred Fiffe to appellant Bermudez, a regular customer of the clothing store, who Fiffe had previously observed snorting cocaine with Diaz-Martinez. Bermudez met with Fiffe and Blanco at Blanco's apartment that evening to discuss the sale. Subsequently Bermudez took Fiffe to appellant Vivas' record store in Brooklyn.

The next day, Blanco called the special agent and told him that the half kilo of cocaine was now available for sale. The agent met Blanco and Fiffe at Blanco's apartment and was taken to Vivas' record store where appellants Bermudez and Vivas were waiting for him in a back

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room. Vivas subsequently produced the half kilo of cocaine, but the transaction was not completed because the agent had not brought the $12,000 necessary to purchase the entire amount or even the $6,500 necessary to buy "a quarter," and Vivas refused to sell less than an eighth kilo.

On November 29, 1973, the special agent met with Blanco and Juanita Guzman in Blanco's apartment. She informed the agent that if he wanted to continue to deal in "quarters"—quarter kilos—he could obtain them at Diaz-Martinez's clothing store.

A warrant was obtained authorizing a search of the clothing store, which was conducted on March 27, 1974. The search turned up narcotics paraphernalia but no drugs. On June 14, 1974, a search pursuant to a warrant was made of appellant Vivas' house. This search discovered traces of cocaine, bags of lactose and a scale.

The indictment was returned on May 30, 1974, charging appellants Diaz-Martinez, Bermudez and Vivas along with Fiffe, Blanco and Miranda of conspiracy to distribute cocaine. After arraignment, Fiffe, Blanco and Miranda agreed to plead guilty and testify at trial. At the trial, the principal witnesses for the prosecution were Fiffe and the undercover DEA agent.

The appellants urge several grounds for reversal of their convictions on this appeal. They claim that (1) the indictment was insufficient because it failed to charge an overt act as part of the conspiracy; (2) cross-examination of Bermudez's character witnesses at trial as to whether they "had heard" of prior narcotics offenses by Bermudez was improper; (3) introduction of evidence of narcotics paraphernalia and narcotics traces found in the home of Vivas six weeks after the termination of the conspiracy was improper; (4) introduction of narcotics paraphernalia seized at the clothing store for the purpose of impeach-

ing Diaz-Martinez's credibility was improper after that evidence had been suppressed on the direct case due to nonspecificity of the warrant; (5) the district court erred in accepting the qualifications of the special agent as an expert able to identify cocaine; (6) the district court's charge to the jury on the weight to be given to the testimony of an accomplice was in error; (7) the midtrial instructions on what constitutes a conspiracy were unfair; (8) the trial court coerced a verdict and cut short the jury deliberations; (9) the trial court erred in refusing Diaz-Martinez's motion for a new trial on the basis of newly discovered evidence. We hold against appellants on all claims of error and affirm each of the convictions.

I. *Sufficiency of the Indictment.* Appellants Bermudez and Vivas contend that an indictment for conspiracy under 21 U.S.C. § 846 must allege an overt act. Although in the ordinary case of a conspiracy under 18 U.S.C. § 371 it has been held that at least one overt act must be set forth in the indictment, *United States* v. *Offutt*, 127 F.2d 336, 338 (D.C. Cir. 1942) (then 18 U.S.C. § 88),[1] "there is au-

1. The statutory requirement of 18 U.S.C. §371 that "one or more of [the conspirators] do any act to effect the object of the conspiracy" is what distinguishes the general statutory crime of conspiracy from common law conspiracy. *See United States v. Rabinowich*, 238 U.S. 78, 86 (1915) (act need not be criminal, much less constitute "the very crime that is the object of the conspiracy"). The drug conspiracy statute, 21 U.S.C. §846, reads simply: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The indictment here referred to a conspiracy between October 31, 1973, and May 1, 1974, to violate Section 841(a)(1) of Title 21 and said "It was a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance." Counts 2, 3, 4 and 5 charged substantive offenses against Blanco, Fiffe and Miranda. Count 6 charged Bermudez and Vivas with the substantive offense of possessing with intent to distribute one-half kilogram of cocaine, on or about November 20, 1973.

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thority to the effect that proof of an overt act is not a necessary element of a conspiracy charged under 21 U.S.C. § 846." *United States* v. *Tramunti*, 513 F.2d 1087, 1113 n.28 (2d Cir.), *cert. denied*, —— U.S. —— (1975), *citing, e.g., Ewing* v. *United States*, 386 F.2d 19 (9th Cir. 1967), *cert. denied*, 390 U.S. 991 (1968); *United States* v. *DeViteri*, 350 F. Supp. 550, 552 (E.D.N.Y. 1972). In a case involving an offense under 21 U.S.C. § 846, the conspiracy to distribute narcotics is in and of itself a specific crime. Since an indictment is sufficient if it charges the offense in the words of the statute, *Grene* v. *United States*, 360 F.2d 585, 586 (5th Cir.), *cert. denied*, 385 U.S. 978 (1966), an indictment under 21 U.S.C. § 846 is sufficient if it alleges a conspiracy to distribute drugs, the time during which the conspiracy was operative and the statute allegedly violated, even if it fails to allege any specific overt act in furtherance of the conspiracy. *See United States* v. *Murray*, 492 F.2d 178, 192 (9th Cir. 1973), *cert. denied*, 419 U.S. 854 (1974); *cf. Singer* v. *United States*, 323 U.S. 338 (1945) (Douglas, *J.*) (no overt act requirement for conspiracy offense under draft evasion statute); *Nash* v. *United States*, 229 U.S. 373, 378 (1913) (Holmes, *J.*) (same re Sherman Act). Thus, the "overt act" requirement for general conspiracy charges under 18 U.S.C. § 371 does not apply where a particular type of conspiracy has, as in the case of 21 U.S.C. § 846, been made a specific, substantive offense, *i.e.*, is permissible "on the common law footing." *Nash* v. *United States*, *supra*, 229 U.S. at 378. Under the standard which applies to the indictment in this case, appellant's claim of insufficiency therefore must be rejected.

II. *Cross-Examination of Character Witnesses.* At the trial appellant Bermudez presented two character witnesses who vouched for his reputation in the community as a

law-abiding citizen. Before cross-examining these witnesses, the prosecutor informed the court that he intended to ask the witnesses whether they "had heard" that the defendant Bermudez had been arrested in 1974 on a marijuana charge. The prosecutor supplied documentary proof of the arrest to the court, and Chief Judge Mishler ruled that the questions would be allowed.

Where a witness is testifying as to the good reputation of the defendant in the community, the prosecutor may inquire as to the witness's knowledge of prior offenses of the defendant since such knowledge bears on the credibility of reliability of the witness's assertion. *See Michelson* v. *United States*, 335 U.S. 469 (1948);[2] *United States* v. *Silverman*, 430 F.2d 106, 125-26 (2d Cir.), *cert. denied*, 402 U.S. 953 (1970); 3A J. Wigmore, Evidence § 988 (Chadbourn ed. 1970). It was proper for the trial court to allow the question whether the witness "had heard" of the disparaging rumor "as negativing the reputation." *Id.* The prosecutor did not here commit the error of probing for the truth of the fact of prior misconduct, a quest which would violate the rule against the use of evidence of prior crimes to prove the bad character of the defendant. *See* Fed. R. Evid. 404(b); *United States* v. *Torres*, No. 74-2303 (2d Cir., July 2, 1975), slip op. 4573.

III. *Admission of Post-Conspiracy Evidence Seized at Vivas Home.* The trial court admitted evidence of "traces of narcotics" and narcotics-related equipment (lactose, scales and other implements) which had been seized in a search of the Vivas home conducted with a warrant. This search was made six weeks after the conspiracy alleged in the indictment had terminated. Appellants

2. The Court said that the form of the inquiry here, "Have you heard?," has general approval while "Do you know?" has not. *Michelson v. United States*, 335 U.S. 469, 482 (1948).

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claim that it was reversible error for this evidence to have been introduced at trial. They argue strenuously that the evidence is too prejudicial to be admitted in view of its only slight probative impact.[3] *See United States* v. *Papadakis*, 510 F.2d 287, 294-95 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).

Evidence obtained by searches conducted after the termination of a conspiracy has frequently been held admissible to prove the existence of the conspiracy even though occurring after its conclusion. For example, in *Lutwak* v. *United States*, 344 U.S. 604, 617 (1953), in a case involving a conspiracy to enter into false marriages for the purpose of circumventing immigration restrictions, the Supreme Court held admissible evidence of post-conspiracy *conduct* which showed the false character of the marriages and the fraudulent intent of the parties in entering upon them. *Compare Anderson* v. *United States*, 417 U.S. 211 (1974) (post-conspiracy declarations admissible where not offered to prove truth of declaration and hence not hearsay), *with United States* v. *Krulewitch*, 336 U.S. 440, 443 (1949) (declarations of one conspirator after conspiracy

3. In *United States v. Torres*, 519 F.2d 723 (2d Cir. 1975), we stated the criteria to be applied to determine the admissibility of "other crimes" committed by a defendant at his trial for a separate offense. There we held that "other crimes evidence is admissible on the Government's case in chief unless introduced *solely* to show the defendant's criminal character, provided that its probative worth outweighs its potential prejudice." *Id.* at 4580. Since the evidence seized at the Vivas home is not plainly "evidence of other crimes" (possession of lactose and a set of scales, and the presence of "traces of cocaine" in one's apartment not rising, by themselves, to the level of a federal crime), it is not clear that the *Torres* case controls here. Even assuming that it does, since the evidence seized at Vivas' home was used to show his prior participation in the conspiracy to distribute narcotics, and not his bad character, the "other crimes" test in *Torres* reduces to the "balance of prejudice and probative value" test applied by *Anderson v. United States*, 417 U.S. 211, 221-22 (1974), and *United States v. Tramunti*, 513 F.2d 1087, 1116 (2d Cir. 1975), *cert. denied*, —— U.S. —— (1975).

has ended inadmissible). The rule these cases have articulated is that "acts of one alleged conspirator could be admitted into evidence against the other conspirator, if relevant to prove the existence of the conspiracy, 'even though they might have occurred after the conspiracy ended.'" *Anderson* v. *United States*, *supra*, 417 U.S. at 219, *quoting Lutwak* v. *United States*, *supra*, 344 U.S. at 618.[4]

This reasoning has been applied in both *United States* v. *Tramunti*, *supra*, 513 F.2d at 1116, and *United States* v. *Bennett*, 409 F.2d 888, 895-96 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969), to find that narcotics seized after the termination of a conspiracy are admissible to prove the prior existence of the conspiracy. In *Bennett* the court allowed into evidence the fruits of a post-conspiracy search which had uncovered "the instrumentalities used in a ramified narcotics conspiracy . . . ." 409 F.2d at 895. The underlying justification for these cases appears to be that such evidence tends to show the intent or state of mind of the appellant to enter upon the conspiracy to distribute narcotics. *See, e.g., United States* v. *Mallah*, 503 F.2d 971, 981 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975) (post-conspiracy possession of eight thermometers evidence of intent to participate in prior narcotics conspiracy); *United States* v. *Cohen*, 489 F.2d 945, 948-49 (2d Cir. 1973) (post-conspiracy participation by defendant in firearms training activities at Jewish Defense League camp admissible to show state of mind to enter conspiracy to falsify federal firearm registration forms).

The possession by appellant Vivas of "instrumentalities used in a ramified narcotics conspiracy" is more than only

4. Whatever prejudice there may have been as to appellant Vivas by the admission of this late-seized evidence was limited to him by the district court's instructions to the jury to the effect that the evidence was not to be considered as to the guilt or innocence of Bermudez and Diaz-Martinez.

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slightly probative. It tends to show that Vivas had an intent and a state of mind to enter upon a narcotics distribution scheme. It also tends to corroborate the testimony of Fiffe and the special agent that Vivas was an active participant in the conspiracy involved in this case. We do not consider that any potential prejudice to appellant Vivas which may have stemmed from the introduction of this physical evidence outweighs the probative value of that material, as it did in *United States* v. *Falley*, 489 F.2d 33 (2d Cir. 1973). We reject appellant's claim of error.

IV. *Use of Excluded Evidence for the Purpose of Impeaching Diaz-Martinez's Credibility.* On March 27, 1974, the clothing store owned and operated by appellant Diaz-Martinez was searched pursuant to a warrant by agents of the Drug Enforcement Administration. Although no narcotics were found, a number of items used in the narcotics trade were seized. Upon appellant Diaz-Martinez's motion, the trial court suppressed these items on the ground that the description of the premises to be searched was unconstitutionally broad. The court found that the description "293 Clothing Corporation, 293 Grand Street" did not, with sufficient specificity, distinguish the clothing store and basement, where the search was actually conducted, from the two floors of apartments located above the clothing store. Since the warrant could have permitted a search of the entire building, and there was probable cause for search of the bottom floors only, the warrant was defective due to overbreadth and the materials seized were properly suppressed. *See Steele* v. *United States*, 267 U.S. 498 (1925) (building to be searched may be identified by street and number); *United States* v. *Kay*, 432 F.2d 647 (D.C. Cir. 1970) (search of apartment above store described on warrant invalid); *United States* v. *Hinton*, 219

F.2d 324 (7th Cir. 1955) (in multiple occupancy structures the particular unit to be searched must be identified); *United States* v. *Brown*, 151 F. Supp. 441 (E.D. Va. 1957) (same).[5]

The court nevertheless allowed use of this evidence for impeachment of the testimony of Diaz-Martinez who had taken the stand in his own behalf. The appellants do not object to its admissibility for this limited purpose. In *Oregon* v. *Hass*, 420 U.S. 714 (1975), the Supreme Court held that excluded evidence may become admissible for impeachment purposes where a defendant has "taken the stand and testified contrarily to the inculpatory information . . . ." *Id.*[6] The appellants' objection here is that the trial court, in its charge to the jury, erred in not telling the jury that they could not consider this evidence to determine whether Diaz-Martinez had committed the crime charged.

No such limiting instruction was given by Chief Judge Mishler, but none of the appellants made a request at trial that such a charge be given. In the absence of clear error by the trial court in its instructions, failure to make timely

5. The Government urges on this appeal that since there was a separate entrance to the top two floors of the clothing store building the multi-unit character of the building was not externally apparent and was not known to the officers who applied for the warrant. If this were, indeed, the situation, and there was no way they could have known of that chracter, then it is possible that the warrant would fall within the exception provided by *United States* v. *Santore*, 290 F.2d 51, 66-67 (2d Cir. 1959), *aff'd in parts here relevant*, 290 F.2d 74 (2d Cir. 1960) (en banc), *cert. denied*, 365 U.S. 834 (1961), to the multi-unit specificity requirement. But in light of our determination that the evidence was properly used as impeachment of Diaz-Martinez at trial, we need not reach this rather troublesome issue.

6. There is lacking on this record the type of abusive police conduct which might prohibit use of excluded evidence even for purposes of impeachment. *See Oregon* v. *Hass*, 420 U.S. 714 (1975). Rather, here the error was a technical omission in the warrant description, *see* note 5 *supra*.

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request for, or objection to, instructions to the jury waives all objections to the charge given. Fed. R. Crim. P. 30. Failure to give limiting instructions is generally held not to be plain error. *United States* v. *Bozza*, 365 F.2d 206, 214 (2d Cir. 1966) (failure to include charge limiting purpose for which the jury could consider evidence of crime not charged in the indictment not plain error). *See also United States* v. *Blount*, 479 F.2d 650, 651 (6th Cir. 1973); *United States* v. *Ballentine*, 410 F.2d 375 (2d Cir. 1969), *cert. denied*, 397 U.S. 928 (1970); *United States* v. *Cifarelli*, 401 F.2d 512, 514 (2d Cir. 1968), *cert. denied*, 393 U.S. 987 (1969); C. Wright, Federal Criminal Practice and Procedure § 496, at 326 (1969).

V. *Qualifications of the Special Agent as an Expert Witness for Detection of Cocaine.* The special agent who participated in the drug transaction with appellants Bermudez and Vivas was permitted to testify at trial that, in his opinion, the glistening white, powdery substance offered for sale to him by Vivas on November 20, 1973, was cocaine. Appellants Bermudez and Vivas claim that the special agent was not qualified to make such a judgment and that permitting his testimony in this regard was reversible error.

While chemical analysis of the white powdery substance is doubtless the best basis for expert identification of cocaine, it is not the only basis. The agent testified that while at BNDD basic training school he had been specially trained to make visual identifications of different drugs, including cocaine, and that during his four years of experience as an agent for the Drug Enforcement Administration he had on nearly 35 occasions identified cocaine solely upon observation, and that most of these identifications had been confirmed by laboratory tests and at least five also by the local anesthetic effect produced from rubbing a small part of the body. The agent also gave a detailed

explanation of how cocaine may be visually identified especially where as here it contains "rocks," *i.e.*, small lumps of compressed cocaine.[7] And his visual observations of the cocaine actually purchased on November 5 and November 12 had been confirmed by laboratory tests.

A district court judge has quite wide discretion in determining the qualifications and competency of a witness to express an opinion as an expert. His decision should not be disturbed unless there is a clear showing of abuse of discretion. *Tropea* v. *Shell Oil Co.*, 307 F.2d 757, 763 (2d Cir. 1962); Fed. R. Evid. 702 (Advisory Committee Note). *See also Cross* v. *Estate of Patch*, 123 Vt. 11, 178 A.2d 393 (1961). On the facts before the district court there was plainly a sufficient practical basis for the special agent's testimony to be admitted. *See* 7 J. Wigmore, Evidence § 1923 (3d ed.). *See also United States* v. *Atkins*, 473 F.2d 308, 313 and cases cited (8th Cir.), *cert. denied*, 412 U.S. 931 (1973) (addict permitted to express opinion on whether substance heroin). The trial court properly charged the jury that the agent's testimony was not binding upon them and that they were the ultimate judge of its worth. Accordingly, the appellants' claim of error in this regard must be rejected.[8]

VI. *Mid-Trial Instructions on Conspiracy.* The Government offered the testimony of the special agent regarding the acts and declarations of appellant Bermudez. When defense counsel objected to the admissibility of this evidence as against the other defendants, it became necessary

7. The agent testified that he used a spoon to sift through one of the two November 20 bags constituting the one-half kilo offered and found a large unbreakable "rock" and that the powder numbed his thumb and index finger when rubbed between them.

8. The appellants' claim that testimony by a chemist that cocaine cannot be identified by observation made the latter's evidence inadmissible is lacking in merit since it goes only to weight, not admissibility.

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for the court to explain to the jury the circumstances under which the testimony was to be tentatively received. *See United States* v. *Cohen*, *supra*, 489 F.2d at 950. Accordingly, Chief Judge Mishler instructed the jury as to the elements of a conspiracy, and as to the admissibility of the acts of one coconspirator as against all other coconspirators. Defense counsel objected to the instructions as given, and the trial court decided to repeat the instructions word for word as they appear in 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §§ 23.09, 29.05-.06 (2d ed. 1970). Appellants urge that the initial instructions were so prejudicial as to require a new trial; they do not attack the validity of the second instructions as given.

In the first instructions Chief Judge Mishler instructed the jury that only if they found the existence of a conspiracy could they charge each defendant with the acts of their coconspirators. This charge was proper under *United States* v. *Jacobs*, 431 F.2d 754, 761 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971). He further charged that one coconspirator is liable for the acts of another in furtherance of the conspiracy even if he has no knowledge of the act or opposes it. While this instruction may also be appropriate, *see Pinkerton* v. *United States*, 328 U.S. 640, 646-47 (1946), the analogy chosen by the trial court to illustrate the proposition was, perhaps, inapt. The metaphor used was that of two grocers who were partners who would both be liable for an order of 500 cases of canned corn made by either partner, even if the other knew nothing about it or even opposed the order. This reference to partnership law may be slightly misleading in the conspiracy context of this case. However, viewing the instructions as a whole, *see, e.g., United States* v. *Cisnecos*, 491 F.2d 1063 (5th Cir. 1974); *United States* v. *Thurman*, 417 F.2d 752 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1026

(1970), and considering that a second set of instructions was given at the same time, the validity of which was not challenged, we find no prejudice to the defendants stemming from the mid-trial charges.

VII. *District Court Charge on the Weight to be Given to an Accomplice's Testimony.* The trial court properly instructed the jury that the testimony of the accomplice, Fiffe, need not be corroborated to be credited. *Caminetti* v. *United States*, 242 U.S. 470, 495 (1917); *United States* v. *Carrique*, 316 F.2d 186, 187 (2d Cir. 1963) (per curiam). The court warned that

> the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. [The accomplices'] testimony is not to be considered by you as you might consider any ordinary layman's testimony. You must recognize that they say they participated in the crime charged.

The appellants object to this charge which, although sanctioned by *United States* v. *Corallo*, 413 F.2d 1306, 1322-23 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969), and *United States* v. *Famulari*, 447 F.2d 1377, 1382 (2d Cir. 1971), did not include the specific language found in *United States* v. *Padgent*, 432 F.2d 701, 704 (2d Cir. 1970), which warns that "[a]n accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for the plea of guilty and his testimony."

But the *Padgent* language was in the context of permitting a wide latitude for cross-examination, not as suggested language for instructions. We are satisfied that the charge in this case fairly apprised the jury of the pitfalls of relying upon an accomplice's testimony, and we sustain it on that basis. *See United States* v. *Vita*, 294

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F.2d 524, 526 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962).

VIII. *Supplemental Charge and Jury Deliberations.* After a day of deliberations on the verdict, the jury informed the district court that it was unable to reach a decision and that it was deadlocked on the case. The jury was called to the courtroom and the judge gave a supplemental charge which said in part:

> The lawyers spent a lot of time in preparing and it was a long trial. If you fail to agree it just means that the lawyers will have to do the work all over again and there is no reason to suppose that any other jury is going to be of better quality and decide it differently than you.

The jury returned to the jury room where it deliberated for another full day before reaching its verdict. In light of the several cases in this court which sustain the use of such a charge, appellants' claim must be rejected. The statement of this court in *United States* v. *Hynes*, 424 F.2d 754, 757 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970), as to *Allen*-type charges is equally applicable here:

> The charge is no more than a re-statement of the precepts which the trial judge almost invariably gives to guide the jurors' deliberations in his original charge. Its function is to emphasize that a verdict is in the best interests of both prosecution and defense, and we adhere to the view that "[t]he considerable costs in money and time to both sides if a retrial is necessary certainly justify an instruction to the jury that if it is possible for them to reach a unanimous verdict without any juror yielding a conscientious conviction . . . they should do so." *United States* v. *Rao*, 391 F.2d 354, 355 (2d Cir. 1968).

See also United States v. *Tyers*, 487 F.2d 828, 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974); *United States* v. *Martinez*, 446 F.2d 118 (2d Cir.), *cert. denied*, 404 U.S. 944 (1971). We can find nothing in the charge in this case which exceeds this permissible encouragement to the jurors to pursue their deliberations toward a verdict, if possible, in order to avoid the expense and delay of a new trial. The charge did not coerce a verdict, or direct the jury to reach any result; it merely requested the jurors to continue their deliberations, which they did for another full day before reaching their result. We reject this claim of error.

IX. *Rejected Motion for New Trial by Appellant Diaz-Martinez.* After the trial and verdict in this case, appellant Diaz-Martinez moved for a new trial pursuant to Fed. R. Crim. P. 33 on the grounds of newly discovered evidence. His claim is that only after the trial did he learn that state narcotics agents had cooperated with the federal agents in their investigation of the 293 Clothing Store activities, and the Government had failed to disclose state investigative files in this matter which, under *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), he should have received. He claims these files would have assisted his cross-examination of the Government witness Fiffe.

Even assuming that something in the state files could have aided in the cross-examination, a contention which the Government vigorously disputes,[9] their nondisclosure

9. At the post-trial hearing on the motion for a new trial the Government produced both its own agent and the New York police detective who had participated in the State's investigation. They both testified that there was no joint federal-state investigation of any of the appellants, although there were partly simultaneous separate investigations going on at 293 Grand. The entire state file in the investigation was produced *in camera* for the trial court's in-

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is not grounds for granting a new trial for newly discovered evidence under our recent case of *United States* v. *Slutsky*, 514 F.2d 1222 (2d Cir. 1975). As we there again held, such a motion can succeed only where the evidence discovered after trial could not, with the exercise of due diligence, have been discovered earlier, and where the evidence is so material that it would be likely to have produced a different result had it been available at trial. *Id.* at 1225. Here appellant's counsel could, with due diligence, have discovered the existence of the alleged files. He was aware of pending state court proceedings against Fiffe, Miranda, Blanco and Juanita Guzman for dealing with state narcotics officers during the same period of the present conspiracy because he represented Guzman in that case. In view of that participation he was plainly in a position to subpoena whatever state files he now claims would have assisted preparation for cross-examination of Fiffe. But more importantly, we fully agree with Chief Judge Mishler's finding at the hearing on the motion for new trial that the additional material could not have materially benefited the appellant within the meaning of the *Slutsky* case. *See also United States ex rel. Regina* v. *LaVallee*, 504 F.2d 580, 584 (2d Cir. 1974), *cert. denied*, 420 U.S. 947 (1975).

The trial judge's finding that Fiffe's testimony would not be shaken by the allegedly newly discovered evidence was based both on his *in camera* review of the state files

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spection to verify that assertion.

These witnesses and the Assistant United States Attorney also stated that this local police file was never in the possession of the prosecution or the federal investigators in this case. This uncontradicted evidence makes clear that there was no violation of the Jencks Act, 18 U.S.C. §3500(b), which requires the United States to turn over to defendants the statements of a witness which are "in the possession of the United States."

at issue and upon his firsthand observation of the witness. Where newly discovered evidence is sought to place at issue the credibility of a prosecution witness we find it important to give deference to the conclusions of the trial judge whose presence at the proceedings gives him a far better vantage than our own for this determination. *See United States* v. *Zane*, 507 F.2d 346 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Accordingly, we affirm the denial of the motion for a new trial made by appellant Diaz-Martinez.

Appellants have raised further objections to the conduct of the trial and to the sufficiency of the evidence to support the convictions. We have considered these claims, but none of them raise any substantial matters meriting further discussion.

Judgments affirmed.

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